

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 83-2030

TITLE BOARD OF EDUCATION OF THE CITY OF OKLAHOMA CITY, OKLAHOMA,
Appellant v. NATIONAL GAY TASK FORCE

PLACE Washington, D. C.

DATE January 14, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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BOARD OF EDUCATION OF THE :
CITY OF OKLAHOMA CITY, :
OKLAHOMA, :
Appellant, :
V. : No. 83-2030
NATIONAL GAY TASK FORCE :
- - - - -x

Washington, D.C.

Monday, January 14, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 1:23 o'clock p.m.

APPEARANCES:

DENNIS W. ARROW, ESQ., Oklahoma City, Oklahoma; on
behalf of the appellant.

LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts;
on behalf of the appellee.

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1 MR. ARROW: That's correct, Your Honor.

2 QUESTION: And as I read it there was no
3 threat that it was going to apply it to anyone.

4 MR. ARROW: That's correct, Your Honor.

5 QUESTION: And the only party plaintiff was a
6 national organizaion.

7 MR. ARROW: That's correct, Your Honor. We
8 would observe that based on third party standing
9 rationales, that it is certainly arguable that the Gay
10 Task Force has standing.

11 We would, however, further observe that under
12 the approach of United Public Workers versus Mitchell,
13 there might in fact be a problem with ripeness. Now,
14 this, of course, has not been resolved in the courts
15 below.

16 QUESTION: Is this a case where we ought to
17 have the views of the Supreme Court of the state?

18 MR. ARROW: Your Honor, we feel that it is.
19 We feel that when we are dealing with a statute such as
20 this, which has never been construed, it has never been
21 applied, we certainly do know on the basis of this
22 record that the enforcement policies of the Board of
23 Education of the City of Oklahoma City and of other
24 boards of education in the State of Oklahoma have not
25 been overly exuberant, as has been asserted by the Gay

1 Task Force.

2 QUESTION: Does Oklahoma have a certification
3 statute?

4 MR. ARROW: Yes, Your Honor, it does. That --
5 we have inserted that in the record, in our blue brief.

6 QUESTION: Have you put a copy of it in
7 there?

8 MR. ARROW: Of the certification statute?

9 QUESTION: Yes.

10 MR. ARROW: Yes, Your Honor. We have cited it
11 in part. I can refer you to it. This would be at Page
12 16 of the blue brief, Your Honor, of the brief of
13 appellant, down at the bottom of the page. The citation
14 to that is 20 Oklahoma Statute, Section 1602.

15 QUESTION: Thank you.

16 MR. ARROW: You are welcome.

17 QUESTION: Well, have you urged it before?

18 MR. ARROW: We have urged the lack of standing
19 before. That was decided --

20 QUESTION: How about abstention?

21 MR. ARROW: We have not urged abstention.

22 QUESTION: In either court of law?

23 MR. ARROW: That's correct, Your Honor.
24 Nevertheless, we would assert that at this point this
25 Court certainly could consider it sua sponte.

1 QUESTION: I suppose certification is not the
2 same thing as abstention.

3 MR. ARROW: That's right, Your Honor. We
4 would assert them as alternative arguments. We would
5 assert that abstention in the interest of federalism
6 under the Pullman doctrine would be appropriate here.
7 We would also alternatively assert that should the Court
8 not be persuaded of the Pullman argument in chief, that
9 then the certification statute might easily be invoked.

10 QUESTION: Well, of course, if there is no
11 real case or controversy, if this is just an
12 abstraction, and there is no real threat to the third
13 party people, the plaintiff, it is not a question for
14 abstention, it is not a question for certification, it
15 is a question for dismissal by the District Court on a
16 jurisdictional basis.

17 MR. ARROW: We have so urged that in
18 Proposition 1 -- I believe it is 1B, Your Honor. Yes.

19 Turning to the merits, should the Court not be
20 persuaded of the abstention argument, or of the
21 dismissal argument, we would observe the significance of
22 the interests involved are clearly paramount.

23 Ninety-two percent of all children in the
24 United States of school age attend public schools. We
25 think that this decision in this case may in fact be a

1 central precedent-setting decision for purposes of what
2 public school teachers may and may not advocate.

3 In defending the constitutionality of the
4 challenged statute, the appellant board of education
5 will, as time permits, hopefully address five issues
6 central --

7 QUESTION: May I ask just one question?

8 MR. ARROW: Yes, Your Honor.

9 QUESTION: You say the case will present a
10 test as to what public school teachers may or may not
11 advocate.

12 MR. ARROW: Yes, Your Honor.

13 QUESTION: As you read the statute, does it
14 prohibit activity by a teacher which is advocacy of,
15 just to use the language of the statute, advocacy of
16 homosexual activity?

17 MR. ARROW: Homosexual activity is, of course,
18 defined in very specific terms in the statute, Your
19 Honor, as the commission of an act defined in Section
20 886 of Title 21, which has been defined as the offense
21 of criminal sodomy. So the statute does -- we admit
22 clearly the statute may be disingenuously written.

23 Activity is certainly a very broad term to
24 talk about public homosexual activity, but in Section A1
25 of the statute, the statute goes on very clearly to say

1 what it means by public homosexual activity, and that is
2 the crime of sodomy as defined in Title 21, Section
3 886.

4 QUESTION: Could Oklahoma prohibit a school
5 teacher from smoking in the classroom?

6 MR. ARROW: We certainly think that it could.
7 Yes. That might be --

8 QUESTION: On what grounds?

9 MR. ARROW: On the grounds that it might
10 impair student health, for example. The medical
11 evidence is unclear for --

12 QUESTION: Any other ground besides health?

13 MR. ARROW: Possibly, possibly --

14 QUESTION: How about the role model factor?

15 MR. ARROW: Yes. That is certainly possibly
16 true. The institution that I teach at certainly
17 precludes me from so doing. I think, given the role
18 model nature, I think that might be appropriate.

19 Now, of course, this is within the discretion
20 of the legislature to decide which exact types of
21 activity are worse than other types of activity.

22 QUESTION: Well, the only issue here is
23 conduct, isn't it? Isn't it the conduct part of the
24 statute?

25 MR. ARROW: Well, here we are talking about

1 advocacy of the specific crime.

2 QUESTION: I know, but the statute defines
3 activity and conduct differently.

4 MR. ARROW: That's correct, Your Honor.

5 QUESTION: And what is at issue here, activity
6 or conduct?

7 MR. ARROW: What is at issue here is public
8 homosexual conduct.

9 QUESTION: That's what I thought.

10 MR. ARROW: That's correct, Your Honor.

11 QUESTION: All right. We should talk about
12 that then.

13 MR. ARROW: Yes, Your Honor. I plan on doing
14 that.

15 QUESTION: I am still a little puzzled,
16 because the term "conduct" as used in the statute
17 includes advocacy, does it not?

18 MR. ARROW: Yes, it does. Yes, it does.

19 QUESTION: Yes.

20 QUESTION: So necessarily we have to talk
21 about advocacy.

22 MR. ARROW: Absolutely correct, Your Honor.

23 QUESTION: And does this statute -- would this
24 statute make it dischargeable conduct for a public
25 school teacher to make a speech in which he advocated as

1 a general proposition that private homosexual activity
2 which is prohibited by law --

3 MR. ARROW: Yes, Your Honor.

4 QUESTION: -- is nevertheless a good idea?
5 Would it be a crime for him to give such a speech?

6 MR. ARROW: For him to advocate the commission
7 of the crime would be precluded by the statute. For him
8 to advocate the decriminalization of the --

9 QUESTION: No, to advocate the commission of
10 the crime.

11 MR. ARROW: Advocating the commission of the
12 crime is precluded by the -- or at least it is
13 regulated, to be quite specific, depending upon the
14 nexus.

15 QUESTION: In your view of the statute, is
16 such a speech prohibited by the statute?

17 MR. ARROW: It is regulated by the statute.
18 It might be prohibited, depending --

19 QUESTION: Is it a cause for discharge if a
20 person gives such a statement?

21 MR. ARROW: On a case by case basis, Your
22 Honor, it might be, depending upon the presence or
23 absence of the nexus factors, depending upon the nexus
24 ramifications. That's why the --

25 QUESTION: I don't understand that.

1 MR. ARROW: Okay. Your Honor, the statute has
2 some very specific limiting factors which we would refer
3 you to in Section 6103.15(C), which include, for
4 example, the likelihood that the activity or conduct may
5 adversely affect students or school employees, proximity
6 in time or place, extenuating or aggravating
7 circumstances, repeated or continuing nature of the
8 conduct, whether or not the conduct is likely to dispose
9 school children towards similar conduct or activity.

10 So, in some cases that type of advocacy might
11 well be precluded by the statute, depending upon the
12 presence or absence in whatever measure --

13 QUESTION: He gave the speech -- he said, I
14 intend to give this speech over and over again.

15 MR. ARROW: Yes.

16 QUESTION: Then I suppose it would be
17 prohibited?

18 MR. ARROW: Well, depending again upon the
19 adverse effect upon students. That, I think, is a
20 factor which the statute requires the hearing boards to
21 consider.

22 Depending upon any other -- I suppose,
23 proximity in time or place. If the speech was given in
24 New York and the teacher was in California, if it was
25 not likely to come to the attention of the students, if

1 it didn't come to the attention of the students.

2 Depending upon what age the students are. We
3 think that would also be an aggravating or mitigating
4 circumstance. Clearly the nexus requirements in the
5 statute are flexible, but they have to be flexible given
6 the very broad interests of the state in effective
7 public education.

8 That, parenthetically, we might add, is one
9 reason why particularly a facial challenge in this case
10 is inappropriate. We believe that generally a better
11 approach is the case by case adjudication method. The
12 statute has never been invoked. It has never been
13 applied. It is challenged facially. And yet it is very
14 difficult to analyze in a particular case all the myriad
15 imponderables that may potentially result from a
16 specific advocacy of that specific crime.

17 QUESTION: Do we know whether the Oklahoma
18 courts would require finding an adverse effect on
19 students or employees under the statute in order to
20 impose sanctions?

21 MR. ARROW: Yes, Your Honor.

22 QUESTION: Do we know that?

23 MR. ARROW: Yes, Your Honor.

24 QUESTION: How do we know that?

25 MR. ARROW: We have the Childers case, which I

1 believe is cited in the brief. This is 645 Pacific 2nd
2 992. There is other case law which was referred to in
3 the District Court opinion which does require it.

4 QUESTION: The adverse effect on students or
5 employees is a requirement in each case?

6 MR. ARROW: Yes, Your Honor, and that was
7 concluded by the District Court. The District Court
8 noted that in his opinion below.

9 Turning to the issues, in recognition of the
10 fact that the case is a very multi-faceted case, with
11 numerous issues, the board would like to at least turn
12 its attention briefly to several of the issues that come
13 to mind.

14 First, the board would like to establish the
15 very multi-faceted nature of the governmental interests,
16 and not only governmental interests in effective public
17 education, but parental and student interests as well.

18 Second, the board will establish that the
19 balancing standard of review is the appropriate standard
20 of review in teacher speech cases, in recognition of the
21 multifaceted nature of the interests in effective public
22 education.

23 And pursuant to this analysis concerning the
24 standard of review, the board of education will further
25 establish that the concept of viewpoint neutrality which

1 the Gay Task Force has attempted to enshrine as
2 sacrosanct in every conceivable application, in all
3 possible hypothetical instances, is simply overextended
4 when the premise of viewpoint neutrality is extended to
5 the advocacy of a crime involved in the area, the
6 sensitive area of public school teacher speech.

7 Third, the board will then proceed to describe
8 the manner in which the challenged statute contributes
9 to the achievement of the governmental, parental, and
10 student interests involved.

11 Fourth, the board will then proceed to
12 maintain that teacher interests in advocating the
13 specified crime of homosexual sodomy may, and again this
14 is central to the analysis this statute, may on a case
15 by case basis be outweighed by the interests in
16 effective public education described above.

17 And finally, the board of education will
18 establish that neither the current generic fitness
19 statutes nor other so-called viewpoint neutral
20 alternatives are available to meet the sui generis
21 threat presented by the advocacy of criminal homosexual
22 sodomy by public school teachers.

23 Turning first of all to the state interests
24 involved, the interests of the state, the board of
25 education would submit, in effective public education

1 are both very compelling and very broad.

2 I think most obvious is the interest in
3 effective and undisrupted academic education, and
4 clearly the apposite Pickering standard of review
5 contemplates this in the first three factors which the
6 Pickering court articulated.

7 Second, I think, and no less important is the
8 interest in developing students' attitudes toward
9 governmental activities, the political process, the
10 obligations of citizenship.

11 This Court recently reaffirmed in the Pico
12 decision that the goal includes the goal of promoting
13 respect and authority for law, which the board of
14 education would submit would be undermined by teachers
15 advocating specified crimes.

16 This goal in fact is so important that as we
17 have indicated in our brief, many primary school
18 teachers consider the obligation to abide by school
19 rules, for example, a more important ultimate lesson in
20 the first several grades of education even than academic
21 education itself.

22 That, we think, is a very clear state
23 interest, the promotion of the respect and authority for
24 law, government, the political process, and the
25 responsibilities of citizenship.

1 QUESTION: Was your answer to the earlier
2 question about whether the statute would be invoked if a
3 teacher simply advocated the repeal of the consensual
4 sodomy statute, would it be invoked then?

5 MR. ARROW: No, Your Honor, it would not. We
6 think that is clearly core political speech. We have
7 specific Oklahoma case law on that point. The case is
8 Gay Activist Alliance versus Board of Regents of the
9 University of Oklahoma, in which the Oklahoma Supreme
10 Court, following the unwavering lead of this Court, of
11 course, recognized that in fact that is clearly
12 protected speech.

13 And we have no reason to doubt that that same
14 line of analysis would not be applied in analyzing the
15 challenged statute here.

16 QUESTION: So the only kind of speech
17 implicated is where a teacher were to advocate the
18 commission of a crime?

19 MR. ARROW: The commission of the specified
20 crime. That is correct, Your Honor.

21 QUESTION: Suppose a teacher sat down at lunch
22 with a number of other teachers and said, I wish they'd
23 leave these homosexuals alone, they are not hurting
24 anyone except themselves, and that was heard by
25 everybody in the room, students and everybody else.

1 MR. ARROW: Yes, sir.

2 QUESTION: Would that violate the statute?

3 MR. ARROW: It would not violate the statute,
4 because to say, I wish they'd leave these people alone,
5 I suppose, could be assumed as a sub silentio suggestion
6 that in fact the statute should be repealed. We think,
7 again, that that is core political speech. That clearly
8 falls far short of advocacy of the specific --

9 QUESTION: That wouldn't be encouraging
10 homosexual activity?

11 MR. ARROW: No, Your Honor. We don't think
12 so. We recognize, of course, that the Gay Task Force --

13 QUESTION: How do we know your state court
14 would think that?

15 MR. ARROW: Well, for example, there was a
16 Tennessee case called Jackson versus -- I would submit
17 the authority to the Court, Your Honor, but there is a
18 Tennessee case in which an advocating --

19 QUESTION: This isn't Tennessee. This is
20 Oklahoma.

21 MR. ARROW: That's correct, Your Honor, but we
22 certainly think that the Oklahoma court might be
23 persuaded by the Tennessee court's reasoning. We
24 certainly think that the Oklahoma Supreme Court would
25 construe the statute in a manner so as to render it

1 certainly immune from facial --

2 QUESTION: The claim here is that this statute
3 is overbroad, isn't it?

4 MR. ARROW: That's correct, Your Honor. Yes.
5 But we think that that claim --

6 QUESTION: And if my hypothetical is one that
7 would be reached by it, it would be overbroad, wouldn't
8 it?

9 MR. ARROW: Yes, Your Honor. If that were
10 precluded by the statute, we think that is core
11 political speech. We think the Oklahoma Supreme Court
12 would recognize that as well. Other courts certainly
13 have.

14 The Oklahoma Supreme Court in the Gay Activist
15 Alliance case recognized that that type of speech is
16 constitutionally protected, and there is no reason to
17 believe it would deviate from that opinion.

18 QUESTION: May I ask one other question?

19 MR. ARROW: Yes, Your Honor.

20 QUESTION: The term "public homosexual
21 activity" is defined as the crime.

22 MR. ARROW: Yes, Your Honor.

23 QUESTION: Is the term "private homosexual
24 activity" defined? Because you can't advocate that,
25 either, as I read the statute.

1 MR. ARROW: That's correct, Your Honor. It is
2 not in the statute.

3 QUESTION: It is not defined?

4 MR. ARROW: It is not defined.

5 QUESTION: Well, what about a speech then
6 advocating private homosexual activity and said, but be
7 careful not to violate the prohibition against public
8 homosexual activity?

9 MR. ARROW: Yes, sir. I understand, Your
10 Honor. But in Section A2 of the statute, the statute
11 provides that homosexual conduct means advocating and so
12 forth public or private homosexual activity.

13 QUESTION: Right.

14 MR. ARROW: So we would certainly concede that
15 the advocacy of private criminal sodomy would also come
16 within the statutory sweep.

17 QUESTION: Well, is all private homosexual
18 activity a crime?

19 MR. ARROW: Yes, Your Honor, it is in the
20 State of -- criminal homosexual -- homosexual sodomy,
21 public or private, is illegal in the State of
22 Oklahoma.

23 QUESTION: Well, I'm not sure that answered my
24 question.

25 MR. ARROW: Okay.

1 QUESTION: Is all private homosexual
2 activity --

3 MR. ARROW: As defined in this statute?

4 QUESTION: Well, the term isn't defined in
5 this statute.

6 MR. ARROW: Well --

7 QUESTION: Private homosexual activity.

8 MR. ARROW: Oh, I see, Your Honor. Okay.

9 QUESTION: Is all private homosexual activity
10 forbidden by law in Oklahoma?

11 MR. ARROW: If we take activity in the sense
12 of meaning what it is in Section A1, then yes --

13 QUESTION: No, no, because that refers to
14 public. I am asking about private.

15 MR. ARROW: Well, if we assume that the
16 definition of the activity, Your Honor -- that is what I
17 am focusing on, is the definition of activity.

18 QUESTION: There is no definition of
19 activity. There is a definition of public homosexual
20 activity in one.

21 MR. ARROW: That's correct, Your Honor. We
22 think a reasonable reading of the statute would mean
23 that the activity proscribed was the activity involved
24 in Section 886 of Title 21, and we think that private
25 could easily be interpreted as simply that same activity

1 defined in Section 886, however, which was practiced in
2 private.

3 QUESTION: Then the word "private" is really
4 redundant in the statute, isn't it?

5 MR. ARROW: Yes, Your Honor, it would be.

6 QUESTION: You suggest that they could just
7 read those words out of the statute?

8 MR. ARROW: Which words are we --

9 QUESTION: And that the statute does not in
10 fact prohibit -- the words "private homosexual activity"
11 out of A2. As I understand your reading, they are
12 totally redundant.

13 MR. ARROW: That's correct, Your Honor. They
14 would be. Yes.

15 In order to just briefly wrap up the point
16 about state interests involved here, the third and, I
17 think, one which is crucial to the resolution of this
18 case also is providing an appropriate introduction to
19 traditional, fundamental cultural values, and we think
20 that is no less of a significant value of public
21 education than the academic education side.

22 The Court has recognized, for example, this
23 Court, in Pico that students must be assisted in
24 adjusting normally to their environment. They must have
25 traditional, fundamental cultural values promoted, and

1 this Court has continuously respected the significance
2 of that interest, and has also recognized that the duty
3 to promote traditional fundamental cultural values
4 extends whether those -- I am quoting from this Court's
5 opinion in Pico -- "be they social, moral, or
6 political." We think that is a crucial state interest
7 involved.

8 And then, finally, given the fact that the
9 state is acting in loco parentis in taking charge of
10 students for specified times in each day -- 92 percent
11 of students do so attend -- we think there is also an
12 additional duty there to provide for the psychological
13 as well as the physical welfare of children which are in
14 its custody pursuant to the in loco parentis doctrine.

15 We think cumulatively these interests are
16 compelling, though they need not be under the Pickering
17 balancing approach.

18 With these goals in mind, the Court has, of
19 course, adopted a balancing standard of review ever
20 since the landmark watershed opinion in Pickering in
21 1968, nor, we would submit, pursuant to the Pickering
22 balancing approach, are state and teacher interests the
23 only interests to be weighed in the balance.

24 We would further submit that student interests
25 of the sort recognized by this Court in Ginsberg,

1 Ferber, and FCC versus Pacifica Foundation, should be
2 weighed in the Pickering balance as well. We would
3 further suggest, and the Gay Task Force certainly has
4 suggested a virtually limitless marketplace of ideas
5 approach to be applied pursuant to its analysis of First
6 Amendment teacher speech rights.

7 However, the board of education would submit
8 that teachers may have restrictions placed on their
9 speech, as was recognized, not specifically, but
10 analogously in other cases.

11 The Court, for example, noted in Ginsberg that
12 a state may permissibly determine that at least in some
13 areas a child, like someone in a captive audience, is
14 not possessed of that full capacity for individual
15 choice which is the presupposition of First Amendment
16 guarantees.

17 The board of education therefore submits that
18 the Pickering approach and not the impressionistic and
19 incomplete approach adopted by the Tenth Circuit
20 majority below should guide analysis in the instant
21 case.

22 The Gay Task Force has suggested an absolute
23 principle of viewpoint neutrality to be applied under
24 all circumstances and in all contexts, including teacher
25 speech. The board of education submits that this

1 premise is overextended in light of the crucial value
2 orientation function which public schools and public
3 school teachers, who obviously act as role models to
4 impressionable youth, are called upon to fulfill.

5 In the educational context, we would submit,
6 the premise is overextended, although viewpoint
7 neutrality as a general premise is certainly
8 legitimate.

9 We would pose a couple of hypotheticals at
10 this juncture. For example, let's suppose that the
11 State of Oklahoma hypothetically passed a statute
12 precluding teachers from advocating the use of hercine,
13 which is also a felony in the State of Oklahoma, as is
14 criminal sodomy.

15 We certainly would suggest that viewpoint
16 neutrality would not suggest that because viewpoints
17 antithetical to heroine use could be presented, that
18 therefore viewpoint neutrality would also mean that
19 viewpoints favorable to it should be presented.

20 This might conceivably be extended in other
21 circumstances even past criminal conduct, but of course
22 the Court would not need to go that far, but for example
23 let's suppose we had another Oklahoma statute in which
24 the court, for example, or in which the legislature
25 decided that teachers should not be permitted to

1 advocate racial bigotry in public in a way which is
2 likely to come to the attention of the students.

3 Clearly racial bigotry is not criminal. This
4 statute involves criminal activity. But we certainly
5 think viewpoint neutrality would not go that far.
6 Consequently, we assert that that premise is simply
7 overextended as applied to teacher speech in public
8 education, especially when the nexus factors and the
9 appropriate hearings would permit the determinations to
10 be made on a case by case basis.

11 Pursuant to the applicable Pickering balancing
12 standard of review, the Oklahoma legislature has elected
13 to regulate not a flat ban, as is asserted by the Gay
14 Task Force, the manner in which public school teachers
15 advocate the specified crime of homosexual sodomy.

16 The statute, we would submit, in terms of its
17 nexus factors, is as narrowly drawn as can reasonably be
18 expected without the necessity of writing another
19 Napoleonic Code, given the breadth of the interests in
20 effective public education, given the need on a case by
21 case basis to determine whether in a particular case
22 there has been a material or substantial disruption in
23 the educational process.

24 QUESTION: The Napoleonic Code is actually
25 very short.

1 MR. ARROW: Pardon me, Your Honor?

2 QUESTION: I say, the Napoleonic Code is
3 actually very short. It just treats tort law in one
4 sentence.

5 MR. ARROW: That is true, Your Honor. Point
6 well taken. Perhaps the United States Code would be a
7 better example.

8 In short, we would submit, pursuant to this
9 analysis, that the target clearly -- that the statute
10 does clearly target the aforementioned goals of
11 producing effective public education, making sure that
12 student morality is not corrupted, ensuring that the
13 students are protected in their psychological as well as
14 physical wellbeing, and that the obligations of
15 citizenship, which include the obligation to obey the
16 law, and we might again parenthetically point out here
17 what is essentially asserted by the Gay Task Force is
18 that the laws against criminal homosexual sodomy are
19 uncommonly silly laws, but certainly one of the
20 obligations of citizenship is to obey the law whether
21 the law is uncommonly silly or not, provided that the
22 right of core political speech to advocate that the law
23 should be changed is preserved, and we would submit that
24 that is in fact preserved under the instant statute.

25 We would next assert that teacher interests

1 may on a case by case basis be outweighed by interests
2 of the state, of parental rights, and of the students
3 themselves of the privacy nature that we have just
4 described, and again, we would assert that clearly the
5 statute does not overbroadly preclude teachers from
6 advocating legislative change.

7 The Gay Task Force has asserted that joining
8 the National Democratic Party might somehow indirectly
9 encourage or promote criminal sodomy because the
10 National Democratic Party does have a plank which does
11 advocate the decriminalization of any forms of
12 homosexual activity.

13 We think that that reading of the statute is
14 simply not a fair reading. We think that that reading
15 of the statute attempts to insert the word "indirectly"
16 prior to the words "indirectly advocating," or
17 "indirectly promoting," or "indirectly encouraging."

18 We don't think that's a fair reading of the
19 statute. We don't think that that's the reading that
20 would be given to that statute should the statute ever
21 be invoked and should the Supreme Court of Oklahoma be
22 called upon to construe it in any context.

23 The last argument I'd like to address is the
24 argument asserted by the Gay Task Force that other
25 viewpoint neutral alternatives may be available as less

1 restrictive alternatives to the present system of
2 regulation of speech.

3 And we would attempt to first of all put this
4 argument in context, of course. The less restrictive
5 alternative as applied to teacher speech is not an
6 individually dispositive first amendment standard of
7 review when applied to teacher speech.

8 This Court made very clear in the Pickering
9 decision that in fact the balancing test was to be
10 applied. The Court waxed eloquent on the dangers of
11 mechanistic jurisprudence. Certainly heeding that
12 caution, the board of education would not attempt to
13 itself fall victim to mechanistic jurisprudence by
14 asserting that the Pickering factors are exclusive.

15 And as a result of that, the board of
16 education would concede arguendo that the question of
17 the availability of a less restrictive alternative
18 should be considered, but only as a factor in applying
19 the Pickering balancing approach. It should not be held
20 to be an individually dispositive criterion here.

21 It therefore becomes appropriate to examine
22 the other availabilities, the other statutes, for
23 example, the generic Oklahoma teacher fitness statute,
24 in an attempt to ascertain whether or not activity which
25 can clearly constitutionally be proscribed might also

1 not be proscribed by a viewpoint neutral generic statute
2 such as that which is in place currently in the State of
3 Oklahoma.

4 We would refer the Court to Title 70, Oklahoma
5 Statute, 6-103, the main generic teacher fitness
6 statute, which includes, for example, among reasons for
7 dismissal of public school teachers, immorality, wilfull
8 neglect of duty, incompetency, cruelty, and moral
9 turpitude, as well as the commission of a felony.

10 Well, of course, beginning at the end,
11 advocacy of criminal sodomy is not a felony in Oklahoma,
12 so it certainly wouldn't come under the condition of a
13 felony.

14 Moral turpitude case law has been somewhat
15 obscure. In the case of Kelly versus City of Tulsa, for
16 example, the criteria were given as involving an act, an
17 offense, which is actually a crime, committed with
18 criminal intent, and in that case the court concluded,
19 the Oklahoma Supreme Court concluded that being a public
20 drunk was not an act of moral turpitude since by
21 definition it was not committed with criminal intent.

22 We don't think moral turpitude stretches to
23 cover the conduct which is precluded under the instant
24 challenged statute.

25 Wilfull neglect of duty has been very narrowly

1 interpreted. The Childers case, which I have cited
2 before to the Court, talks about knowingly and
3 purposefully. In any case, the question of neglect of
4 duty doesn't seem to be applicable to the challenged
5 statute.

6 QUESTION: Did you cite Childers in your
7 brief?

8 MR. ARROW: Yes, we did, Your Honor. I
9 believe we did. We did not, Your Honor.

10 QUESTION: That's what I thought. So what is
11 the citation?

12 MR. ARROW: The citation on this is 645
13 Pacific 2nd 992.

14 QUESTION: Thank you.

15 MR. ARROW: You are welcome, Your Honor.

16 QUESTION: Incidentally, did you cite Pico in
17 your brief?

18 MR. ARROW: I believe it is, yes, Your Honor,
19 I believe it is in a footnote in the yellow brief, I
20 believe.

21 QUESTION: Not in the blue brief?

22 MR. ARROW: That's correct, Your Honor.

23 In short, because of the sui generis nature of
24 the threat to student morality, to proper traditional
25 cultural values, the threat which goes further and may

1 under certain circumstances in specific cases also
2 affect the effectiveness of teacher performance in the
3 classroom, as Justice Frankfurter noted long ago, the
4 law of imitation operates, and non-conformity is not an
5 outstanding of young children, we think therefore that
6 all of the goals of public education may be threatened
7 by teacher advocacy of this specific crime.

8 We think, given the breadth of the interests
9 of the state, of the family, and of the child himself,
10 in effective public education and the preservation of
11 student morality, we therefore think that these
12 interests simply outbalance any teacher interest in
13 advocacy of this specific crime.

14 QUESTION: Well, in order to violate this
15 statute or to be a reason for his discharge, there has
16 to be a finding that even though he --that the conduct,
17 the public homosexual conduct that is charged has
18 rendered him unfit.

19 MR. ARROW: That is correct, Your Honor.
20 Those are the nexus factors, the determination of
21 unfitness. The advocacy is the only condition present.

22 QUESTION: And does the conclusion that he is
23 unfit have to come within one of the reasons in that
24 general statute about fitness?

25 MR. ARROW: Yes, Your Honor, we think it

1 does. The statute does say -- the factors, of course,
2 of mitigating circumstances and occupational performance
3 are very broad, and would require and would necessitate
4 that the hearing officers consider a multiplicity of --

5 QUESTION: But after they consider these four
6 factors in Paragraph C, they still have to arrive at a
7 bottom line on fitness.

8 MR. ARROW: That's correct, Your Honor.

9 QUESTION: That has to be one of the reasons
10 in that general statute?

11 MR. ARROW: That is correct, Your Honor.

12 Thank you.

13 CHIEF JUSTICE BURGER: Mr. Tribe.

14 ORAL ARGUMENT OF LAURENCE H. TRIBE, ESQ.,

15 ON BEHALF OF THE APPELLEE

16 MR. TRIBE: Mr. Chief Justice, and may it
17 please the Court, writing for the California Supreme
18 Court nearly a decade ago, the late Justice Tobriner
19 recognized that the modern struggle for homosexual
20 rights in this country is truly a struggle for civil
21 rights, and he said, like other such struggles, it
22 incites heated political debate.

23 The issue in this case is how open that debate
24 will be, and it was in addressing that issue that the
25 Court of Appeals held that Oklahoma's teacher fitness

1 law is unconstitutional, and I quote, "insofar as it
2 punishes advocating, encouraging, or promoting public or
3 private homosexual activity," the latter term, as
4 Justice Stevens points out, not even being defined.

5 QUESTION: Do you suppose Justice Tobriner
6 would embrace in that general statement the laws on
7 drugs, murder?

8 MR. TRIBE: I think he would have said that
9 the right to advocate change in those laws, to express
10 therefore misgivings about the views they take, is a
11 fundamental protected right.

12 QUESTION: A right to decriminalize them?

13 MR. TRIBE: The right to decriminalize
14 anything. That is, those who advocated violent
15 overthrow of the government, as long as they didn't
16 incite imminently to it, were exercising protected First
17 Amendment rights.

18 It is not how much we disagree with the view,
19 but whether it imminently incites.

20 QUESTION: Now, bringing it away from his
21 general statement down to the framework of this case --

22 MR. TRIBE: Yes.

23 QUESTION: -- suppose the prohibition was
24 against advocating drug use, private or public, murder.

25 MR. TRIBE: Well, I suppose if a teacher were

1 foolish enough to say, you know, I think these murder
2 laws are silly, I think, to use Justice Brennan's
3 example, murder is really a pretty good idea, that
4 teacher would probably be civilly committable, but I
5 doubt that that teacher would be violating -- that
6 teacher would be going across the Brandenburg line.

7 The Brandenburg line does not depend on how
8 silly or how disagreeable the view is.

9 QUESTION: What if the advocacy is of theft,
10 rape? The same proposition --

11 MR. TRIBE: Well, Mr. Chief Justice, however
12 long the list, the principle for which this case, I
13 think, ought to stand is that if one is simply
14 expressing misgivings about the law, whether sub
15 silentio or expressly, one should not be punished.

16 For example, Justice Stewart about 25 years
17 ago in a case also involving trying to make what was
18 then criminal activity, sex outside of marriage, appear
19 attractive, in the case of Kingsley Pictures, made clear
20 that the right to make what was then a crime seem
21 perfectly normal and attractive was a form of protected
22 advocacy every bit as much, he said, as advocacy of
23 socialism or the single tax.

24 But I want to make clear that the lines they
25 are attempting to draw, though perhaps responsive to the

1 Chief Justice's concern, are lines not drawable at all.
2 It was this Court that recognized in *Wrightman v. Mulkie*
3 about a decade before Oklahoma's law was passed that the
4 repeal of any legal prohibition may be said to encourage
5 the activity formerly prohibited.

6 So, the result is that if someone says, I am
7 in favor of repeal of the sodomy laws, or I believe we
8 should pass gay rights laws, that person could obviously
9 be said to encourage homosexual activity, and that is
10 not an abstract matter.

11 The abstract discussion would subject that
12 teacher to this entire statutory scheme in which there
13 are so many uncertainties, and what it means is
14 concrete.

15 QUESTION: Mr. Tribe, I think the abstraction
16 in this case is that, if you agree, the statute has
17 never been applied to anyone, no one is being threatened
18 with its application, it has never been construed by the
19 state courts. Are all three of those points true?

20 MR. TRIBE: It is threatening every day, which
21 is why --

22 QUESTION: Has the Oklahoma City School Board
23 in this record threatened to apply the statute to any
24 particular individual?

25 MR. TRIBE: No particular individual has

1 asked, but because the chilling effect is so thorough --
2 there is no question in this record. The complaint
3 alleges that the members of the Gay Task Force, not
4 third parties but members of the plaintiff, are afraid
5 openly to discuss homosexuality.

6 The Attorney General of Oklahoma says that the
7 reason this statute should be kept on the books is that
8 they have a right to get rid of gay rights activists.

9 QUESTION: Well, but there is no allegation as
10 I read it that this particular regulation of the
11 Oklahoma City School Board has ever been applied to a
12 single living soul.

13 MR. TRIBE: Because they are all --

14 QUESTION: I am not interested in why.

15 MR. TRIBE: You are right, Mr. Justice
16 Rehnquist. There is no allegation that it has ever been
17 applied. In that sense, this case is on all fours with
18 Pecunier v. Martinez, involving prison censorship, never
19 applied, but the scheme held invalid by this Court --

20 QUESTION: Well, it is also on all fours with
21 Poe against Ullman, it seems to me.

22 MR. TRIBE: But in Poe v. Ullman, it seems to
23 me, Mr. Justice, the issue of ripeness was a serious
24 one. Here the allegation is that these teachers are
25 ready to discuss this issue now but are afraid to do

1 so.

2 When summary judgement was entered, it was
3 entered on a stipulation saying that there was no
4 genuine dispute of fact.

5 QUESTION: Yes, but there was no allegation in
6 the complaint that this statute was ever -- had ever
7 been applied.

8 MR. TRIBE: Because the allegation is that
9 they were afraid to test it. Justice Rehnquist, I --

10 QUESTION: Well, but how far can you back up
11 from a statute and still challenge it?

12 MR. TRIBE: Well, if you have to nudge
13 yourself right up against it and risk your job to
14 challenge it, then this Court, I think, clearly has to
15 overrule Baggett v. Bullitt and Paishe.

16 QUESTION: Well, in Baggett against Bullitt,
17 the principal had circulated a memorandum saying that
18 these teachers were going to have to take the oath.
19 There was not the total absence of enforcement there
20 that there is here.

21 MR. TRIBE: Well, they could have taken the
22 oath, but then you see their argument was, the argument
23 of the other side was, it is perfectly harmless to take
24 the oath. All you have to do is then never cross the
25 forbidden line, and it could have been said then, no one

1 was ever threatened with being pushed over the cliff,
2 and the answer was, because they were afraid to get
3 close to the line.

4 This Court, I think, has made clear in, for
5 example, not only Pecunier, which applied to prisoners,
6 but Virginia Board of Pharmacy, which applied in the
7 commercial speech context, that if a law is void on its
8 face and controls pure speech, then you needn't push the
9 authorities into applying it to you before you get a
10 facial test of it.

11 Surely that principle, that there can be
12 anticipatory attacks on laws that facially invalidly
13 regulate speech can't be limited to prisoners and
14 commercial speech.

15 QUESTION: The defendant was the board, wasn't
16 it?

17 MR. TRIBE: The defendant was the board of
18 education of the City of Oklahoma.

19 QUESTION: And is it true that it has a
20 statutory obligation to enforce it?

21 MR. TRIBE: It has a full statutory
22 obligation, Justice White, to enforce it.

23 QUESTION: It had no discretion but to enforce
24 it?

25 MR. TRIBE: There appears to have been none.

1 That is why they were the ones who were sued rather than
2 any other state officer.

3 QUESTION: I suppose -- and the complaint did
4 allege that.

5 MR. TRIBE: That's right. The complaint
6 alleged it, and that was, in fact, among the things that
7 the defendants admitted rather than questioning.

8 But I think we can come close to the specific
9 threat Justice Rehnquist wants if we go back a little in
10 time to February 12th, 1981, when there was a colloquy
11 between counsel for the board of education and counsel
12 for the National Gay Task Force before the District
13 Court on the motion to dismiss on exactly the ground
14 that you are raising, Justice Rehnquist.

15 At that point, the position of the board was,
16 you guys are free to discuss anything you want as long
17 as you don't cross this line that we understand, that
18 is, as long as you don't intentionally urge anyone to go
19 out and commit criminal sodomy.

20 Counsel for plaintiff, the National Gay Task
21 Force, then said, fine, we will drop this entire lawsuit
22 if the board enters into a binding decree, a binding
23 consent decree restricting the law's enforcement to that
24 extent. In other words, remove the threat.

25 Well, counsel for the board perhaps was

1 nonplussed. He said, I'm not sure I can do that. I am
2 working for a political body. And then he refused.
3 This is in Volume 3 of the Court of Appeals record, at
4 Pages 24, 34, and 40.

5 So that the Oklahoma law itself on its face
6 continues to threaten protected speech across the full
7 range of the law's literal reach.

8 QUESTION: Mr. Tribe, do you agree with the
9 narrow interpretation of this statute described by your
10 opponent today?

11 MR. TRIBE: Well, I certainly don't agree with
12 any narrow interpretation I have heard before. The one
13 described today is a little hard for me to follow.

14 He says in answer to Justice Brennan's
15 question, what if a teacher says, perhaps in a
16 discussion with fellow employees, or let me say at a PTA
17 meeting, or on a local talk show, I wish they'd leave
18 these homosexuals alone, they are not hurting anybody
19 else, would that teacher then be subject to immediate
20 suspension while they tried to figure out what this law
21 meant?

22 And I think with commendable candor counsel
23 was really unable to answer. He said, well, maybe that
24 is a kind of sub silentio advocacy of repeal. Well, if
25 all they are talking about is soliciting homosexual

1 activity, or imposing it, I think it is very clear from
2 the opinion below that teachers even after the decision
3 of the Court of Appeals can still be fired for
4 soliciting or imposing.

5 They are obviously talking about expressing
6 the point of view that homosexual activity shouldn't be
7 made subject to criminal laws, that homosexuals
8 shouldn't be harassed or stigmatized.

9 QUESTION: Mr. Tribe, isn't that the reason
10 you should give the state an opportunity to limit its
11 own laws?

12 MR. TRIBE: Well, Justice Marshall, I would
13 love to have the state do that if it could be done in a
14 single plausible construction, but this Court has --

15 QUESTION: Well, couldn't you file a lawsuit
16 against them in the state court?

17 MR. TRIBE: Well, in fact this Court itself
18 could certify the case to the Supreme Court of Oklahoma,
19 and that would surely be better than making us start
20 from the beginning, but let me ask this Court to think
21 about --

22 QUESTION: Why?

23 MR. TRIBE: Why would that be better?

24 QUESTION: Why would that be better?

25 MR. TRIBE: Well, because this Court has held

1 about eight times that the high cost of keeping the
2 chilling effect of this kind of law in place while
3 someone is dragged through another judicial system is
4 not worth paying.

5 QUESTION: Do you mean you filed this case for
6 the purpose of getting us to send it back?

7 MR. TRIBE: No, no, we filed this case for the
8 purpose of being able to speak freely.

9 QUESTION: You say now it is all right to send
10 it back.

11 MR. TRIBE: No, I say it would be better to
12 send it back than make us go through from the word go.
13 But let's think about what would happen if you sent it
14 back. What would you ask the Supreme Court of
15 Oklahoma? Would you give them a multiple --

16 QUESTION: You are asking a state supreme
17 court to interpret its own state statute.

18 MR. TRIBE: Right.

19 QUESTION: That is all you are asking.

20 MR. TRIBE: But if the question is that
21 open-ended, I would hate to serve on that state supreme
22 court.

23 QUESTION: Well, after we hear your argument
24 we will know what to ask them.

25 MR. TRIBE: Well, I think after you hear the

1 argument you might know, if you agree with me, that
2 there is no finite list of questions that would help,
3 because the very questions already asked from this
4 bench, I think what we got was an example of the
5 Draconian chilling confusion caused by this law.

6 For example, Justice O'Connor asked, what
7 about that first criterion? Must there be likelihood of
8 adverse effect? And then counsel invented the Childers
9 case, which I guess -- I have read the case. It is not
10 in the briefs. The case deals with an interpretation of
11 the sodomy law, not of this law.

12 As they say, this law has never been
13 interpreted because it has never been applied, because
14 its chilling effect is so severe.

15 Then they turn to a Tennessee case. The fact
16 is that if you just read the statute, all it says is,
17 certain factors shall be considered. It doesn't say any
18 of them must be present.

19 And then, what is the meaning of adverse
20 effect? That is, embarrassment by fellow teachers is
21 obviously not to be desired. That is an adverse
22 effect. Now, the Supreme Court of Oklahoma might write
23 a 1,000-page essay. Well, by adverse effect, it has got
24 to be very adverse. It might try to tell you what that
25 meant.

1 But the whole theme of many of this Court's
2 decisions dealing with certification as well as
3 abstention is that when a law is so broad and sweeping
4 in its chill of protected discussion that you couldn't
5 get a simple, clear, single definition of just how far
6 it reaches, not in a long series of adjudications, which
7 might never occur because of the chilling effect of the
8 law --

9 QUESTION: You are starting there with a
10 conclusion that this is protected discussion. Isn't
11 that what this case is about, whether it is protected
12 discussion?

13 MR. TRIBE: Of course, even the board of
14 education concedes that if it comes anywhere close to
15 advocating repeal, it ought to be protected, but
16 remember, when they were asked to narrow the law's
17 enforcement to that extent, in February of 1981, they
18 refused.

19 Actually, this Court has dealt with problems
20 rather like that in a case called Thomas v. Collins, the
21 leading case back in 1945. It was common ground in that
22 case that it is not protected discussion for a union
23 organizer actually to solicit members in the union
24 without first getting some kind of union card.

25 But on the other hand, it was protected just

1 to extol the virtues of unionism. The problem in that
2 case and the conclusion of the Court was that when a
3 speaker has to worry on pain of some concrete penalty if
4 he guesses wrong whether others will take his words of
5 praise for unionism, like Justice Brennan's example,
6 what is so wrong with what these gay people do, whether
7 others will take those words of praise as an
8 impermissible encouragement to join up, then the freedom
9 of speech is fatally abridged.

10 And I think the fundamental teaching of this
11 Court's cases all the way back from Thomas in '45 to
12 Baggett and Paishian is that the First Amendment forbids
13 forcing speakers to walk across that kind of tightrope
14 even if the state promises that it might supply some
15 kind of safety net if they should happen to fall.

16 QUESTION: Do you think a legislature is
17 entitled to take into account the reality, if you
18 concede that it is a reality, that teachers in schools,
19 particularly grade school and high school level, are
20 role models for the pupils?

21 MR. TRIBE: I think that, Mr. Chief Justice,
22 that certainly can be taken into account, but when
23 President Reagan editorialized against this very law in
24 California, about six years ago, his answer to the role
25 model point was, first of all, as a matter of common

1 sense, there is no reason to believe that homosexuality
2 is something like a contagious disease.

3 He quoted a woman who said that if teachers
4 had all that much power as role models, I would have
5 been a nun many years ago.

6 His point really was, this role model business
7 can be taken only so far, and this Court itself said in
8 Ambach against Norwich, recognizing teachers are role
9 models, yes, and we can make them be citizens, yes, but
10 in Footnote 10 this Court said, of course, we are not
11 saying you can muzzle them, we are not saying you can
12 tell them what to discuss.

13 And this Court in Abood versus the Detroit
14 Board of Education not very long ago expressly held that
15 although they are role models, public school teachers
16 have First Amendment rights every bit as broad as
17 private citizens when they talk on matters of public
18 interest, whether they are talking politics or
19 philosophy or ethics or social change.

20 Now, recognizing that teachers are role models
21 does not mean that the First Amendment --

22 QUESTION: Abood wasn't a classroom teaching
23 case. That was a case where the teachers were
24 presenting a point of view to the school board.

25 MR. TRIBE: That's right, Justice Rehnquist,

1 but one of the conclusions in Abood, I think, would
2 imply that if the teacher's union to which teachers had
3 to contribute began engaging in lobbying, saying we
4 should tighten up the laws against gay activity, then a
5 teacher would be free to withhold her dues.

6 And surely if she is free to withhold her
7 dues, she is free to explain at a PTA meeting or in a
8 newspaper why she is withholding her dues, and if she
9 quotes Justice Brennan and says, I am withholding my
10 dues because I think that being gay, though right now it
11 is a crime, oughtn't to be, there is nothing wrong with
12 it, then that teacher runs afoul of this law, because
13 that could be said to encourage.

14 And this case, too, doesn't involve a
15 classroom situation. That is, in no way do we challenge
16 the power of Oklahoma to prescribe a curriculum. In no
17 way do we challenge the power of Oklahoma to direct what
18 may be included in class.

19 QUESTION: Well, you do challenge, I take it,
20 a rule that said that you may not discuss homosexuality
21 in class?

22 MR. TRIBE: Well, of course, that would be
23 subsumed in this case, but this case goes way beyond
24 class.

25 QUESTION: Well, I know, but so you would say

1 there are some limits to what you --

2 MR. TRIBE: Sure there are, Justice White, and
3 I would -- let me give you an example. Suppose --

4 QUESTION: I would suppose you would say that
5 the teacher in the class could not be fired for in class
6 urging that the laws against homosexuality be repealed.

7 MR. TRIBE: Well, in a math class --

8 QUESTION: Is that right or not?

9 MR. TRIBE: -- that would conflict with the
10 curriculum rules.

11 QUESTION: Well, I know, but any time, any
12 time.

13 MR. TRIBE: I think, Justice White, I would
14 probably urge that, but we don't have to prevail on that
15 view for this law to be struck down.

16 QUESTION: I know you don't because you are
17 arguing overbreadth, that it covers non-classroom
18 activity.

19 MR. TRIBE: That's right, but even in class,
20 Justice White, suppose during a recess a child runs in
21 and says, what should I do, I just saw these kids
22 ganging up on Johnny, they claim Johnny is gay. This
23 law is in effect. The teacher is in a dilemma.

24 On the one hand, the teacher could say
25 nothing, and encourage disrespect for fellow students.

1 On the other hand, the teacher can say something
2 sympathetic to Johnny, who is thought to be gay. The
3 moment the teacher does that, then as President Reagan
4 said when he opposed this law, someone may be listening,
5 and the teacher may be in trouble.

6 QUESTION: When you say ganging up, I take it
7 you mean chiding.

8 MR. TRIBE: Chiding or perhaps beating up on.
9 That is, the experience in the State of Oklahoma has not
10 been a happy one. There have been violent episodes
11 against homosexuals, and in light of those violent
12 episodes, it is not surprising that the law has had so
13 chilling an effect.

14 QUESTION: That is not in this record.

15 MR. TRIBE: Well, the chilling effect, Justice
16 Marhsall, is in the record.

17 QUESTION: I am talking about the beating up
18 business.

19 MR. TRIBE: That is right. I think the
20 Court --

21 QUESTION: That is not in this record.

22 MR. TRIBE: The Court may just have to take
23 notice of some realities.

24 QUESTION: Let's stick to the record.

25 MR. TRIBE: Nor is it necessary to our case

1 that we talk about that. I am simply trying to put this
2 case in context.

3 QUESTION: It is necessary to stick to the
4 record.

5 MR. TRIBE: I will do that, Justice Marshall.
6 And with respect to the record in this case, if I might
7 go back to the idea that these nexus requirements might
8 somehow save the law, either the way they are written or
9 the way they might be construed if this Court were to
10 certify the case to the Supreme Court of Oklahoma, it
11 seems to me that the key to that is Justice White's
12 question about whether all of these factors might
13 somehow be collapsed into nothing through that magic
14 word, "unfit," because if you really had to find that
15 independent of the viewpoint the teacher expressed, the
16 teacher was independently unfit to teach, in terms of a
17 general background and otherwise valid fitness rules,
18 then of course this law would be entirely superfluous
19 except for one important factor.

20 And that is that under this law there is a new
21 basis and an important basis for chilling all speech
22 that comes anywhere close to the line, and that is in
23 Section 6103.3 of the statute, which is very much in
24 this record.

25 Whenever a superintendent of a school district

1 has reason to believe that cause exists for dismissal,
2 then the teacher can be suspended without even a hearing
3 while one tries to figure out whether the teacher is
4 unfit within the meaning of this law, and then when you
5 look at this law, what does it tell you?

6 It says that a teacher may be discharged if
7 the teacher has been rendered unfit because of such
8 conduct or activity. Conduct is in turn defined as
9 speech. In other words, you can be rendered unfit
10 simply because the point of view you express might
11 directly or indirectly encourage homosexual activity.

12 Now, it is suggested by Mr. Arrow that we are
13 somehow guilty of reading the word "indirectly" into
14 this law to make it look broader. On the contrary, when
15 they were invited before the District Court to narrow
16 the law by reading the word "directly" into it and an
17 intent requirement into it, to eliminate the directly
18 threatened enforcement of the law as it now stood, they
19 declined that invitation.

20 QUESTION: Do you think counsel could amend
21 the statute in the District Court?

22 MR. TRIBE: Well, the problem is, I suppose,
23 counsel couldn't even promise not to enforce it. That
24 is, he surely couldn't amend it.

25 QUESTION: Well, let's stay with the

1 amending. You are chastising him for not amending the
2 statute. Until he gets elected to the legislature, he
3 has no standing to do that.

4 MR. TRIBE: I certainly don't mean to be doing
5 that. I am suggesting, however, that if in this Court
6 he tells us in response to Justice Rehnquist's question
7 that there is no real threat of enforcement against
8 people who merely discuss, he certainly had the power to
9 eliminate that threat by entering into a consent
10 decree.

11 But as Justice White points out, this law is
12 essentially self-executing. They have no discretion
13 about its enforcement. If you put yourself in the
14 position of a public school teacher in Oklahoma either
15 before the Tenth Circuit acted or after this Court might
16 send the case back on certification to the Oklahoma
17 Supreme Court, and if you ask yourself, must I hedge and
18 trim every word I utter on this controversial public
19 subject, because otherwise I will be suspended and I
20 might ultimately be discharged, your answer is surely
21 yes.

22 That is, this law, by virtue of the threat
23 that is on its face reinforced by the sweeping
24 interpretation given by the Attorney General of the
25 State of Oklahoma, this law in effect tells teachers,

1 you had better shut up about this subject, or if you
2 talk about it, you had better be totally hostile to
3 homosexuals.

4 And the real question is whether it is
5 consistent with the traditions of free speech and open
6 inquiry for that lesson to be given.

7 You asked, Mr. Chief Justice, about the role
8 model function of teachers, and I do take that
9 seriously, but it seems to me that when Justice
10 Frankfurter in 1952 talked about teachers as the high
11 priests of our democracy, he made an important point in
12 suggesting that one of the most important values that
13 those teachers model is the value of open inquiry, the
14 value of free speech and an informed citizenry.

15 And even the teacher who out in society
16 advocated some of the really more outlandish positions
17 that might be attributed to people, not this position,
18 which is hardly outlandish -- 29 states have adopted it
19 -- but even if a teacher out in the society, in the
20 community, said, I think that many of the laws that all
21 you people think are reasonable are really crazy, it is
22 part of the lesson that teachers are to impart in this
23 society that a teacher ought not to be silenced and
24 fired for that.

25 QUESTION: Mr. Tribe, I notice you haven't

1 cited In Re Sawyer. Don't you get any comfort from
2 this?

3 MR. TRIBE: Which aspect of the holding?

4 QUESTION: That was where the lawyer
5 criticized the Smith Act.

6 MR. TRIBE: It would seem to me that if
7 lawyers can't be punished for criticizing the Smith Act,
8 as you point out, Justice Brennan, then teachers can't
9 be punished for criticizing the anti-sodomy act.

10 QUESTION: You think those two things are
11 quite parallel, apparently.

12 MR. TRIBE: The anti-sodomy act and
13 overthrowing the government? It seems to me that, if
14 anything, it is obviously more serious to bring the
15 government down by force and violence than to engage in
16 even the private conduct for whose advocacy a teacher
17 could be fired.

18 But interestingly, Mr. Chief Justice, Judge
19 Barrett, dissenting in the Tenth Circuit, thought it was
20 the other way around. That is, he thought that even
21 though this form of advocacy or encouragement or
22 promotion of criminal and violent overthrow of the
23 government would be protected, that there was something
24 so much worse about homosexuality, because it was, he
25 said, malum in se, that you don't have to show any real

1 probability of harm. You just fire someone.

2 It seems to me that that expresses an attitude
3 of horror and unspeakability also suggested by the fact
4 that the crime isn't even named in the Oklahoma
5 statute. It is the destestable crime against nature.
6 One can either view it as so horrible that it can't even
7 be named or one can view it as activity that is really
8 nobody else's business.

9 But however you view it, isn't it the
10 fundamental lesson of freedom of speech that those who
11 seriously disagree with the majority's view should not
12 be forced to hedge and trim every word, waiting to hear
13 what the Oklahoma Supreme Court on certification tells
14 them this vague and opaque and sweeping and broad law
15 really means?

16 QUESTION: What are the immediate consequences
17 of trying to overthrow the government by use of actual
18 force and violence? The immediate consequences are
19 reciprocity with the same kind of treatment, are they
20 not?

21 MR. TRIBE: You mean other speech?

22 QUESTION: Yes, you get shot.

23 MR. TRIBE: If you incite it, you would get
24 shot, surely, and if you incite homosexual activity,
25 then you are committing a crime in Oklahoma, and you go

1 to jail, and from jail you can't teach.

2 QUESTION: No, you are changing this quite
3 markedly. I am saying that if you go out and begin to
4 overthrow the government, any government of any country,
5 the authorities will start shooting themselves. They
6 don't engage in lawsuits. They shoot. Isn't that
7 right?

8 MR. TRIBE: I suppose that's right, Mr. Chief
9 Justice, and I suppose if you go out and begin
10 committing homosexual sodomy, that is, anything close to
11 the act itself is a crime in Oklahoma, and if you impose
12 it or solicit it, that is, the kind of activity that is
13 ancillary to it, you can be fired as a teacher.

14 The question in this case isn't what happens
15 if you begin to commit it. The question is, what
16 happens if you discuss it favorably, express sympathy to
17 it, express sympathy in any of a number of possible
18 ways?

19 And there is no way to give an answer to that
20 question by one simple interpretation. The only way to
21 give that answer is to apply the First Amendment to it.
22 And in the name of the First Amendment, it seems to me
23 that there is only one correct outcome in this case.

24 One moral certitude after another has led men
25 to hound others from their midst. Their ideas seemed

1 alien. They were too different. But as Justice
2 Brandeis reminded us long ago, men feared witches and
3 burnt women. That is not the proudest part of this
4 nation's heritage.

5 QUESTION: Mr. Tribe, what -- public
6 homosexual conduct is what is involved here, but it must
7 at least include either advocating, soliciting,
8 imposing, encouraging, or promoting.

9 MR. TRIBE: That is right. Encouraging --

10 QUESTION: I take it -- you have said time and
11 time again that if you just got up and urged that the
12 law be repealed, the law against homosexuality be
13 repealed, you would be advocating, soliciting, imposing,
14 encouraging, or promoting?

15 MR. TRIBE: Encouraging or promoting. Well,
16 as you said, Justice White, in the Wrightman case,
17 remember --

18 QUESTION: Well, as to the Wrightman case,
19 this is the first time I have heard that case cited for
20 anything.

21 (General laughter.)

22 MR. TRIBE: It is the one proposition to which
23 it may really be relevant.

24 QUESTION: Well, it may not be.

25 (General laughter.)

1 QUESTION: We will soon find out. You say the
2 word is "advocating?" Is that it?

3 MR. TRIBE: The three words together,
4 advocating, encouraging, or promoting.

5 QUESTION: Advocating that the law be repealed
6 would be encouraging?

7 MR. TRIBE: No, advocating that the law be
8 repealed might encourage or promote the underlying
9 activity. The reason that you advocate repeal is to
10 liberate the activity from the inhibition of this law.

11 QUESTION: But the activity wouldn't be
12 encouraged until repeal actually took place, would it?

13 MR. TRIBE: I suppose the activity is
14 indirectly encouraged. But remember, Mr. Justice
15 Rehnquist, I think it is quite crucial that when that
16 line of argument was pursued in the District Court, that
17 is, it would be quite satisfactory to the Gay Task Force
18 to have this law effectively rewritten by somebody, or a
19 promise of non-enforcement clearly and bindingly made,
20 if you stop short of deliberately urging the actual
21 commission of the crime.

22 People don't get up on soapboxes and say,
23 sodomy now. That isn't the problem.

24 (General laughter.)

25 QUESTION: If the Task Force offered to

1 stipulate to a construction in the District Court, it
2 seems to me that is all the more reason why the state
3 court should be given an opportunity to construe it.

4 MR. TRIBE: If the state court in a single
5 decision could construe it, that would be fine.

6 QUESTION: Couldn't they construe it according
7 to the stipulation that your client offered to enter
8 into?

9 MR. TRIBE: That it construe it to -- if this
10 Court were to ask the state court, does this law
11 henceforth apply only to directly and deliberately
12 urging the commission of the specific crime with the
13 intent that the crime be committed, and if their answer
14 to that question is, yes, we will effectively rewrite
15 the law so that it all it covers, that would satisfy the
16 purpose.

17 QUESTION: Suppose a teacher gets up in a
18 classroom and says, I encourage each of you to engage in
19 homosexual activity, and that is all he says or she
20 says. Now, could that teacher be legally fired under
21 this Act?

22 MR. TRIBE: I would think even without this
23 law, that teacher could probably have been legally
24 fired, because -- well, certainly under this law that
25 teacher could be fired. I guess your question is, would

1 it be constitutional to apply the law that way to that
2 teacher.

3 QUESTION: I want to know whether you would
4 say firing a person for saying that would be
5 constitutional.

6 MR. TRIBE: Under this law I think not, but in
7 general the answer is, I think you could fire someone in
8 class for saying, I encourage you to go out and commit a
9 crime, and it wouldn't matter what the crime was. But
10 all that tells us --

11 QUESTION: Whatever the teacher says inside
12 the classroom or outside the classroom has got to be at
13 least to encourage homosexuality.

14 MR. TRIBE: That it has to have that effect.

15 QUESTION: Yes.

16 MR. TRIBE: My time is up. Thank you.

17 CHIEF JUSTICE BURGER: Thank you, gentlemen.
18 The case is submitted.

19 (Whereupon, at 2:24 o'clock p.m., the case in
20 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-2030 - BOARD OF EDUCATION OF THE CITY OF OKLAHOMA CITY, OKLAHOMA, Appellant v.
NATIONAL GAS TASK FORCE

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BY Paul A. Richardson

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